

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 95-661-C - ORDER NO. 96-55✓
JANUARY 30, 1996

IN RE: Petition of AT&T Communications of) ORDER
the Southern States, Inc. Requesting) ADDRESSING
Alternative Regulation of Certain) PETITIONS FOR
Services in South Carolina.) RECONSIDERATION
) AND/OR REHEARING
) OF ORDER
) NO. 95-1734

This matter comes before the Public Service Commission of South Carolina ("the Commission") on the separate Petitions for Reconsideration filed by AT&T Communications of the Southern States ("AT&T") and the Consumer Advocate for the State of South Carolina ("the Consumer Advocate"). On December 15, 1995, the Commission issued its Order No. 95-1734 which addressed AT&T's request for alternative regulation. AT&T received the Commission's Order on December 18, 1995, and filed its Petition for Reconsideration on December 28, 1995. The Consumer Advocate also received a copy of the Commission's Order on December 18, 1995, and posted its Petition for Rehearing or Reconsideration in the U.S. Mail on December 28, 1995. The Consumer Advocate's Petition was received by the Commission on January 2, 1996. The Commission will address each Petition separately.

PETITION OF AT&T

AT&T addresses three major areas in its Petition for Reconsideration. First, AT&T states that the Commission does not

state the standards the Commission will apply in the determination of when services are competitive. Second, AT&T states that the Commission does not explain how the evidence of record was evaluated against the standards which the Commission deems necessary to establish that a service is competitive. And finally, AT&T asserts that the prerequisite that AT&T file average toll rates in South Carolina for relief under Order No. 95-1734 ignores certain pre-existing conditions that caused the deaveraged rates and is discriminatory. Upon consideration of AT&T's Petition for Reconsideration, the Commission grants partial reconsideration of Order No. 95-1734 for the purposes of clarification and modification.

With regard to AT&T's first two issues for reconsideration, regarding the lack of standards used by the Commission in determining when a service is competitive, the Commission finds no error in its decision in Order No. 95-1734. The Commission observed in Order No. 95-1734 that the instant case is a case of first impression under S.C. Code Ann. §58-9-585 (Supp. 1995) and further noted that S.C. Code Ann. §58-9-585 (Supp. 1995) does not define "competitive." Order 95-1734, pp. 5-6. In the determination of whether a service is competitive, the statute does instruct the Commission to "consider, at a minimum, the availability, market share, and price of comparable service alternatives." S.C. Code Ann. §58-9-585 (B) (Supp. 1995) (Emphasis added). S.C. Code Ann. §58-9-585 (A) also provides that the Commission must determine that "a particular service is competitive in the relevant geographic market."

In evaluating the evidence presented at the hearing on this matter, the Commission concluded that AT&T had not met its burden of proof under the statute. By its Petition Requesting Alternative Regulation, AT&T included information regarding the number of firms offering comparable services in South Carolina. For instance, AT&T stated in its Petition that "as of December 1994, this Commission has granted certificates of public convenience and necessity to provide interexchange services to 140 carriers, with 38 additional applications pending." Petition Requesting Alternative Regulation, p. 2 and Attachment 1. Also by its Petition Requesting Alternative Regulation, AT&T provided information on the number of firms providing competing services in South Carolina stating that there existed 114 interexchange carriers offering business long distance, 22 offering private line services, 83 offering 800 services, 74 offering WATS-like services, 68 offering business discounted calling plans, 70 offering operator services, and 83 offering calling card service. Petition Requesting Alternative Regulation, p. 3 and Attachment 2.

AT&T also provided some information regarding market share. In its Petition requesting Alternative Regulation, AT&T stated that its percentage of toll revenue market share declined from 89.7 in 1984 to 59.1 in 1994, that its interstate access minutes declined from 84.2 percent in 1984 to 60.8 percent in 1994 and that in April 1994 less than 45 percent of total business lines were presubscribed to AT&T as the primary carrier. Petition Requesting Alternative Regulation, p. 4 and Attachments 5 & 6.

The Commission is very much aware that the evidence at the

hearing indicated that there have been considerable competitive forces impacting the interexchange carrier market since 1984. While the Commission believes that AT&T did establish that competitive forces are present in South Carolina, the Commission also believes that there was not a sufficient demonstration of the degree of competition to warrant the deregulation of these business services under S.C. Code Ann. §58-9-585 (Supp. 1995).

The Commission recognizes, as was stated by the Supreme Court in S.C. Cable Association v. PSC, et al., "the fact that one is authorized to compete is not evidence that it does, in fact, compete." S.C. Cable Association v. PSC, et al., ____ S.C. ____, ____, 437 S.E. 2d 38, 41 (1993). S.C. Code Ann. §58-9-585(A) provides that the Commission must determine that "a particular service is competitive in the relevant geographic market." The Commission concluded in Order No. 95-1734 that there was insufficient evidence to find the services competitive in South Carolina. While the Commission determined that the competitive forces demonstrated did not warrant deregulation pursuant to S.C. Code Ann. §58-9-585 (Supp. 1995), the Commission did conclude that the competitive forces demonstrated by AT&T did warrant some modification in the existing process which the Commission deemed justified the removal of the price caps. In other words, the Commission determined that the level of competition demonstrated in this proceeding did not warrant the deregulation of these business services but did warrant the removal of the price caps only.

AT&T offers that its witness, Dr. Kaserman, set forth the

traditional standards used to determine the intensity of competition and that the Commission should use those standards to evaluate the competitiveness of services. AT&T's Petition for Reconsideration, p. 7, footnote 2. However, the Consumer Advocate's witness Mr. Buckalew testified that AT&T's plan for alternative regulation was not appropriate at this time and further opined that while AT&T is moving toward competition, the markets are not there at this time. TR. Vol. 2, p. 89 and 93. Mr. Buckalew also stated that AT&T could not demonstrate that the market in South Carolina is workably competitive using studies and data from other jurisdictions. TR. Vol. 2, p. 93. Dr. Rhyne, the Commission Staff's witness, also testified that he "found that there was not adequate data available on a South Carolina basis to conduct a complete analysis of the degree of competition of AT&T's business services." TR. p. 82. Based on the testimony of witnesses Buckalew and Rhyne, the Commission found that the level of competition had not been sufficiently shown in the South Carolina market (which in this instance would be the "relevant geographic market" under S.C. Code Ann. §58-9-585) and concluded that it could not grant the relief requested by AT&T under S.C. Code Ann. §58-9-585 (Supp. 1995). Therefore, the Commission finds no error with its determination.

By its Petition for Reconsideration, AT&T asserts that the Commission needs to set forth in its Order on Reconsideration the standards that the Commission deems necessary in order to establish when a particular service is competitive. AT&T argues that it cannot ascertain whether the Commission has effectuated

the legislative intent when applying the statute. The Commission notes that S.C. Code Ann. §58-9-585(A) provides that "[i]f the commission first determines, after notice and hearing, that the substantial evidence of record shows that a particular service is competitive in the relevant geographic market, the commission may implement regulatory alternatives including, but not limited to, the provisions outlined in this chapter." S.C. Code Ann. §58-9-585 (Supp. 1995) (Emphasis added). Therefore, even if an interexchange telecommunications carrier demonstrates to the Commission's satisfaction that "the substantial evidence of record shows that a particular service is competitive in the relevant geographic market," the approval of an alternative regulatory plan is not mandatory but is discretionary with the Commission.

The Commission stands by its decision in Order 95-1734, but before setting forth in an Order the specific standards by which the Commission will evaluate a request for alternative regulation, the Commission believes that this issue should be noticed and interested parties afforded the opportunity to participate. Therefore, the Commission will establish a generic docket to address the standards which should be applied in the determination of competitiveness of specific services as required under S.C. Code Ann. §58-9-585 (Supp. 1995).

Finally, AT&T asserts that the relief granted by Order 94-1734 which allows for the removal of the maximum rate caps conditioned upon AT&T filing tariffs which reflect average toll prices in South Carolina is discriminatory and ignores the conditions which caused the geographically deaveraged toll rates.

AT&T argues that its tariff contains different charges for calls in areas served by BellSouth due to access reductions from BellSouth in its 1992 earnings case. As those access reductions applied only to calls originating or terminating in BellSouth service areas, AT&T states that the BellSouth access charges were significantly lower than those of other local exchange telephone companies. AT&T also states that it is being "singled out as the only carrier that must average its rates across the state." AT&T's Petition for Reconsideration, pp. 11-12.

Witness Oliver testified at the hearing that AT&T is the only interexchange carrier in South Carolina with deaveraged toll rates. TR. Vol. 3, p 19. The request submitted by AT&T has a direct impact on the concept of pricing of toll services. The Commission believes that it is necessary to reaverage the toll rates to protect ratepayers under the more flexible regulatory process that the Commission has approved for AT&T in this Docket. The Commission is very concerned about the issue of deaveraged toll rates and believes that the further relaxation of regulation, at this point, without the reaveraging of these rates could harm significant numbers of ratepayers and would not be in the best interest of the public.

AT&T's witness, Dr. Kaserman, stated that rates would be driven to reflect the actual costs of providing service under the relaxed regulation proposed by AT&T. TR. Vol. 1, p. 23. Under this concept, the Commission is concerned that the small and rural customers would experience rate increases, while large and urban customers would see a rate decrease. Rural subscribers could face

increased charges for their long distance service and many of the social benefits which subscribers and their rural communities derive from their telephone service could be jeopardized. The rate averaging method, which the Commission has re-established in Order 95-1734 in connection with the removal of price cap regulation for AT&T, averages the costs of carrying calls to high-cost, low volume areas with the costs of carrying calls to high volume areas. Therefore, carriers charge uniform rates for carrying calls to all locations. Proposed federal legislation related to the issue of toll rates maintains that interstate toll averaging be maintained. TR. Vol. 3, p. 19. Thus the Commission believes that the issue of toll rates, and especially the reaveraging of toll rates, was an obvious component of the AT&T request. Furthermore, the Commission believes that the reaveraging of toll rates is necessary under a more relaxed regulatory scenario to protect the public interest.

AT&T also alleges by its Petition for Reconsideration that it "is being singled out as the only carrier that must average its rates across the state." AT&T's Petition for Reconsideration, pp. 11-12. AT&T argues that local exchange companies have area calling plans that include calls which are substitutes for long distance services and there has been no effort to make the area calling plans adhere to statewide average rates. The Commission finds this argument to have no merit. AT&T is not being "singled out" with regard to reaveraging its rates. The Commission views reaveraging of rates as a necessary component of coming under the relaxed regulation as set forth in Order No. 95-1734 and as

modified herein. AT&T is, at this time, the only carrier which is coming under the Commission's relaxed regulation and therefore must reaverage its rates to take advantage of the relaxed regulation. Therefore, the Commission denies reconsideration on this point.

The Commission does take this opportunity to clarify the directive of Order 95-1734 regarding the filing of tariffs which reflect average toll rates. The Commission orders that the toll rates which were placed into effect by AT&T in December 1994 on a deaveraged basis should be filed with the Commission reflecting average rates in South Carolina and with no negative impact on the revenues of AT&T prior to removal of the maximum price caps as ordered in Order No. 95-1734. Further, this Commission does not address by this Order the potential for future rate filings which may reflect rates specifically designed to compete with Area Plus type calling plans.

The Commission also takes this opportunity to reconsider the fourteen (14) day notification requirement on tariff filings. Upon reconsideration, the Commission believes that tariff filings which are impacted by the removal of price caps may be presumed valid upon filing. The Commission may then institute an investigation of the filing within seven (7) days of the filing. If an investigation is instituted, the tariff filing will be suspended until further Order of the Commission.

PETITION OF THE CONSUMER ADVOCATE

By its Petition for Rehearing and Reconsideration, the Consumer Advocate delineates several issues which he asserts

constitute arbitrary and capricious action on the part of the Commission and asks for rehearing and reconsideration on each issue.

First, the Consumer Advocate asserts that the Commission's decision in Order No. 95-1734 has violated the provisions of S.C. Code Ann. §58-8-585 (Supp. 1995). The Consumer Advocate argues that the Commission's "only means by which the Commission may choose to 'not fix or prescribe the rates, tolls, charges, or rate structures' for a telecommunications service of an interexchange telecommunications carrier" is under S.C. Code Ann. §58-9-585 (Supp. 1995). In Order No. 95-1734, the Commission denied AT&T's request under Section 58-9-585. The Commission specifically concluded "that the substantial evidence of record does not show or support a finding that AT&T's services for which it seeks alternative regulation are competitive." (Order No. 95-1734, p. 9). However, the Commission also stated that it believes "as it stated in Order 84-622, in the necessity for flexibility of interexchange carriers to adjust rapidly the rates and charges for their services in response to changes in the market place." (Order No. 95-1734, p. 10).

The Commission discerns no error by its decision in Order No. 95-1734. By its statutory authority and regulatory responsibility, the Commission "is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and

followed by every public utility in this State." S.C. Code Ann. §58-3-140 (Supp. 1995). Further, S.C. Code Ann. §58-9-720 provides in relevant part that "[t]he Commission may, upon its own motion ..., ascertain and fix just and reasonable classifications, regulations, practices or service to be furnished, imposed, observed and followed by any or all telephone utilities"

The price cap regulation, which Order No. 95-1734 modified, was not instituted pursuant to a specific statute such as S.C. Code Ann. §58-9-585 (Supp. 1995) but was instituted by Commission Order No. 84-622 (dated August 2, 1984). Order No. 84-622 was never appealed or overturned and is therefore the law under which interexchange carriers have been operating since 1984. The Commission certainly has authority to modify a practice which the Commission instituted by Commission Order originally. The Commission therefore finds no merit in the Consumer Advocate's argument.

In a similar vein, the Consumer Advocate asserts that the Commission has exceeded its statutory authority because S.C. Code Ann. §58-9-585 (Supp. 1995) is the only authority under which the Commission may choose to remove price caps for services provided by an interexchange carrier. As quoted above, the Commission is granted general regulatory authority, and under that general regulatory authority, the Commission may "ascertain and fix just and reasonable classifications, regulations, practices or service to be furnished, imposed, observed and followed ..." S.C. Code Ann. §58-9-720 (1976). The Commission believes that it has the authority to modify its prior orders and denies reconsideration

and rehearing on the argument.

The Consumer Advocate further argues that S.C. Code Ann. §58-9-585 (Supp. 1995) is a later enacted statute and is specific legislation which would supersede the Commission's general authority. By Order No. 95-1734, the Commission has not released its regulatory control over the business services of AT&T, as envisioned by S.C. Code Ann. §58-9-585 (Supp. 1995). While the Commission has allowed the price caps to be removed if AT&T files tariffs which reflect average toll rates, the Commission will continue to regulate AT&T and to enforce S.C. Code Ann. §58-9-210 (1976) which requires that all telephone utility rates be just and reasonable. The Commission believes that it has properly exercised its authority, and therefore, the Commission rejects the Consumer Advocate's second ground for rehearing and reconsideration.

The Consumer Advocate next asserts that the Commission's decision in Order No. 95-1734 was made upon unlawful procedure in violation of S.C. Code Ann. §1-23-380(A)(6)(c)(Supp. 1995). The Consumer Advocate argues that AT&T filed its Petition under S.C. Code Ann. §58-9-585 (Supp. 1995) and that no notice was given that the request could be considered under the provisions of Order No. 84-622. The Commission believes this argument to be without merit. Clearly, AT&T's Petition Requesting Alternative Regulation requested a modification for certain services from the procedure established by Order No. 84-622. As such, the Commission believes that it was patently obvious that Order No. 84-622 was at issue in the proceeding.

The Consumer Advocate alleges that the Commission's actions in Order 95-1734 are erroneous in view of the reliable, probative, and substantial evidence of record. This alleged error is also premised on the Consumer Advocate's argument that the Commission's only authority upon which the Commission could grant relief was S.C. Code Ann. §58-9-585 (Supp. 1995). The Commission believes that the substantial evidence of record supports its decision in Order No. 95-1734, and based on the discussions herein that the Commission has other authority under which relief may be granted, the Commission finds no error on which to grant reconsideration or rehearing.

Next the Consumer Advocate argues that the Commission has violated the due process rights of the parties in this case. In Order No. 95-1734 the Commission conditioned the relief granted upon AT&T filing tariffs which reflect average toll rates in South Carolina. The Consumer Advocate asserts that the Commission has violated the due process rights of the parties in that there was no notice that the reaveraging of toll rates was an issue in the proceeding. The Consumer Advocate argues that there was no opportunity to present evidence or argument on this issue. The Commission finds this argument to be without merit. Both AT&T's witness Dr. Kaserman and the SCTC's witness Mr. Oliver testified regarding deaverage toll rates. AT&T specifically cross-examined Mr. Oliver on the issue of geographically averaged toll rates. The Consumer Advocate had the opportunity to question Mr. Oliver and Dr. Kaserman on the issue of averaged toll rates and declined to do so. Furthermore, the Consumer Advocate did not object to

any testimony concerning the deaverage toll rates as being irrelevant or outside the scope of the proceeding. Therefore, the Commission finds no error on which to grant rehearing or reconsideration.

The Consumer Advocate also asserts that conditioning relief upon AT&T filing tariffs which reflect average toll rates violates the due process rights of a substantial portion of AT&T's customers. As discussed above regarding AT&T's assertion that the requirement of reaveraging of toll rates is discriminatory, the Commission believes and therefore concluded that the reaveraging of toll rates is necessary to protect the public interest under a more relaxed regulatory scenario. As such, the Commission finds no error in its decision in Order No. 95-1734.

The Commission has examined the Consumer Advocate's Petition for Rehearing and Reconsideration in whole and in its component parts, and concludes that the Petition must be denied.

IT IS THEREFORE ORDERED THAT:

1. The Commission partially grants AT&T's Petition for Reconsideration of Order No. 95-1734 and clarifies and modifies Order No. 95-1734 as stated herein.

2. Order No. 94-1734 is modified so that price caps may be removed upon the filing by AT&T of tariffs which reflect average toll rates in South Carolina. The toll rates which were placed into effect in December 1994 by AT&T on a deaveraged basis may be filed reflecting average rates in South Carolina with no negative impact on the revenues of AT&T prior to the removal of the maximum rate caps in Order No. 95-1734. Further, this Commission does not

address by this Order the potential for future rate filings which may reflect rates specifically designed to compete with area plus type calling plans.

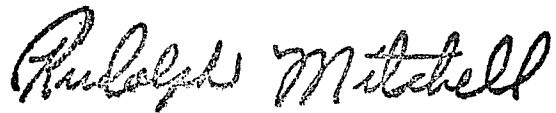
3. Tariff filings which are impacted by the removal of the price caps are presumed valid upon filing. The Commission may then institute an investigation of the tariff filing within seven (7) days in which case the tariff filing will be suspended until further Order of the Commission.

4. A generic docket shall be established to address the standards which will be applied in determining the competitiveness of specific services as required pursuant to S.C. Code Ann. §58-9-585 (Supp. 1995).

5. The Petition for Rehearing and Reconsideration filed by the Consumer Advocate is denied.


6. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:


Deputy Executive Director

(SEAL)

DISSENTING OPINION OF COMMISSIONER WARREN D. ARTHUR, IV

I respectfully dissent from the Commission's decision addressing the Petitions for Reconsideration and Rehearing filed by AT&T and the Consumer Advocate. As I stated in my dissent from the original Order (Order No. 95-1734), AT&T filed its initial Petition under S.C. Code Ann. Section 58-9-585 (Supp. 1994). In that Petition AT&T stated that, "[p]ursuant to S.C. Code Ann., Section 58-9-585 (enacted April 20, 1994), AT&T Communications of the Southern States, Inc., (AT&T) respectfully requests that certain services offered by AT&T are competitive and that the Commission regulate those services pursuant to the aforesaid statute." This Commission is bound by the original Petition of the applicant and the language of Section 58-9-585 to render a decision under this Code section.

Section 58-9-585(A) states that,

"Notwithstanding any other provision of this chapter, the commission, on the request of an interexchange telecommunications carrier or on its own motion, may consider, in lieu of the procedures outlined in this chapter, alternative means of regulating that carrier. If the commission first determines, after notice and hearing, that the substantial evidence of record shows that a particular service is competitive in the relevant geographic market, the commission may implement regulatory alternatives including, but not limited to, the provisions outlined in this section" (Emphasis added).

When the section is read as a whole, its meaning is clear: the Commission may consider alternative means of regulation and implement these alternatives after determining that a service is competitive. A finding of competition is a threshold component of analysis under this code section.

In Order No. 95-1734, the Commission stated that,

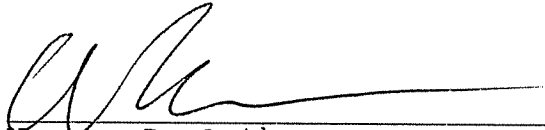
"[a]fter reviewing the record of this case, the Commission believes and concludes that the substantial evidence of record does not show or support a finding that AT&T's services for which it seeks alternative regulation are competitive. The Commission concludes that AT&T has not met its burden of proof as described under the statute with regard to any of its services. Therefore, the Commission finds that it cannot grant relief under S.C. Code Ann. Section 58-9-585 (Supp. 1994) as requested by AT&T." Order Addressing Request for Alternative Regulation, p. 9.

In Order No. 96-55, Order Addressing Petitions For Reconsideration and/or Rehearing of Order No. 95-1734, the Commission states that "AT&T did establish that competitive forces are present in South Carolina," and further that since the Commission "did conclude that the competitive forces demonstrated by AT&T did warrant some modification in the existing process," the removal of price caps and reaveraging of rates for business services was justified. I feel that this Commission should have either made a finding that the services were competitive or not sufficiently competitive in lieu of the reasoning utilized in these two orders.

I believe that the Commission has the authority to make the modifications listed in Order 95-1734 and 96-55, but not in this manner or pursuant to AT&T's original Petition, which was statutorily specific.

Additionally, the Commission's decision to grant the unrequested relief is violative of the interested parties' rights. The reaveraging of rates may indeed have been discussed by various witnesses, but it was not the relief sought by AT&T. Parties were not given notice of consideration of statutory sections other than

Section 58-9-585 and therefore were not prepared to cross-examine witnesses on other such issues. I disagree with the statement in Order No. 96-55 that the reaveraging of toll rates "was an obvious component of the AT&T request." p. 8. Further, the reduction of the fourteen day notice requirement to seven days is an unsupported modification.



Warren D. Arthur, IV
Commissioner, Sixth District